

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2352

ORIGINAL

United States Court of Appeals

For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELM, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

PLAINTIFFS-APPELLANTS' BRIEF

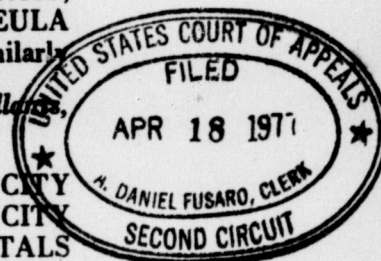
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Defendants-Appellees.

On Remand from the Supreme Court of the United States

PLAINTIFFS-APPELLANTS' BRIEF

This court's order summarily vacating the district court's sua sponte dismissal of plaintiffs' complaint has been vacated by the Supreme Court and remanded for reconsideration in light of the decision in General Electric Co. v. Gilbert, 429 U.S. ___, 97 S.Ct. 401 (1976). This brief is submitted in connection with reconsideration of the prior order.

Issues Presented

1. Whether discriminatory treatment on the basis of pregnancy or maternity, which is shown to have a substantial adverse impact on female as opposed to male employees of the city, is immune from challenge under Title VII of the Civil Rights Act of 1964?
2. Whether a city policy of forcing pregnant employees to take an unpaid leave of absence resulting in permanent loss of seniority and other valuable benefits, without regard to the employees' ability to work, is consistent with Title VII and the Due Process and Equal Protection Clauses of the Fourteenth Amendment?
3. Whether defendants' treatment of pregnancy or maternity resulting in a penalty on exercise of the right to procreation and arbitrarily excluding complicated pregnancies from benefits is immune from challenge under the Fourteenth Amendment?

Constitutional Provisions, Stat-
utes and Regulations Involved

These are set forth in an addendum to the brief, infra, pp. 26-28, and include: the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, relevant portions of Title VII of the Civil Rights Act of 1964 as amended ("Title VII"), 42 U.S.C. § 2000e(2) et seq., and Guidelines of the Equal Employment Opportunity Commission, 29 C.F.R. § 1604.9

Statement of the Case

Plaintiffs, employees of the City of New York, by a complaint filed on January 17, 1974, allege that the defendants have violated Title VII, the Fourteenth Amendment, and various provisions of state law by (1) drastically restricting the coverage and benefits for pregnancy and maternity, including medically-complicated pregnancies, under health and hospitalization insurance provided to city employees (27a-35a); 1/ (2) similarly restricting disability and other benefit plans (36a-39a); (3) forcing pregnant city employees to take unpaid leaves of absence while they are still fully capable of working (39a-42a); and (4) by refusing to permit pregnant city employees to use earned leave time to cover

1/ References to "a" are to pages of the Joint Appendix submitted on plaintiffs' original appeal from the district court's dismissal of the complaint.

absence necessitated by pregnancy and childbirth (id.).

Plaintiffs allege in their first cause of action (27a-33a) that the defendants New York City, its officers and related agencies have unlawfully restricted benefits for pregnancy and childbirth under health and hospitalization plans for municipal employees and their dependants. ^{2/} For example, hospitalization insurance generally covers the full cost of the first 21 days of a hospital stay and pays one-half of the hospital charges for up to 180 days. In contrast, for hospitalization relating to pregnancy or maternity, insurance coverage is limited to a maximum of \$80.00 ^{3/} (28a-30a). The city carries forward this restriction of benefits for pregnancy and childbirth throughout its other medical insurance plans (30a-33a). The defendant insurance carriers and unions are joined with the city in the second and third causes of action, respectively, for collaborating with the city in the discriminatory provision of health and hospitalization insurance (34a-35a).

^{2/} Recent New York legislation requires that hospitalization and medical insurance provide benefits for pregnancy and maternity comparable to general coverage, but the law has no application to insurance policies covering municipal employees. L.1976 Ch. 843.

^{3/} Although increased benefits are provided for surgical maternity procedures and miscarriages, the coverage is still more restrictive than that provided for non-maternity hospitalization.

Plaintiffs allege in the fourth, fifth and sixth causes of action that the city, unions representing municipal employees and their related welfare funds have established and administered programs which provide disability and other benefits to city employees but exclude from coverage conditions related to pregnancy or childbirth (36a-39a).

Finally, plaintiffs allege that the city defendants have required pregnant persons to take mandatory maternity leave which triggered a loss of fringe benefits. In addition, the city defendants precluded pregnant employees from using earned leave time for absence related to maternity (39a-42a). The forced-leave requirement has continuing consequences, for it interrupts the continuity of employment for the purpose of determining promotion and raises (40a-41a). These leave plans are the subject of plaintiffs' seventh, eighth, ninth, tenth and eleventh causes of action (39a-42a).

Several months after the complaint was filed, the Supreme Court decided Geduldig v. Aiello, 417 U.S. 484 (1974) ("Aiello") and held that California's statutory exclusion of normal pregnancy-related disabilities from the state's temporary disability insurance plan for California workers did not violate the Equal Protection Clause of the Fourteenth Amendment. Shortly thereafter, the district court held a hearing on its own motion to determine whether the decision in Aiello

required dismissal of the complaint (232a-289a).

At that time only the initial stages of this litigation had been reached. Four of the 17 defendants (defendants Social Services Employees Union, Social Services Employees Union Welfare Fund, District Council 37 and District Council 37 Health & Security Plan) had not even served answers. There had been no discovery, and plaintiffs had obtained no more information regarding the negotiation, adoption, operation or cost of defendants' plans and policies than that which led them to file their complaint. The defendants had not articulated any rationale to justify their treatment of pregnancy and related conditions.

Nevertheless, the district court, without any factual record before it, determined that Aiello required the dismissal of all of plaintiffs' claims in the absence of an allegation that defendants' plans and policies were adopted as a "pretext," i.e., purposefully designed to effect sex discrimination (242a, 254a). Plaintiffs were given leave to amend their complaint to make such an allegation (301a). After plaintiffs elected not to replead, the complaint was dismissed in its entirety (313a-314a).

Plaintiffs appealed and this court, Judges Kaufman, Lumbard and Smith, summarily vacated the order of dismissal and remanded without opinion, relying on the decision in Com-

munication Workers of America v. American Telephone & Telegraph Co., 513 F.2d 1024 (2d Cir. 1975) vacated and remanded ___U.S.___, 97 S.Ct. 724 (1977). Thereafter four defendants petitioned the Supreme Court for a writ of certiorari. ^{4/}

On December 7, 1976, while the petitions for certiorari were pending, the Supreme Court decided General Electric Co. v. Gilbert, 429 U.S. ___, 97 S.Ct. 401 (1976) ("Gilbert"). The Court held that the reasoning of its decision in Aiello was applicable to actions brought under Title VII and that the record in Gilbert did not show that there had been any discrimination on the basis of sex. Specifically, the Court held that mere classification on the basis of pregnancy and maternity, in connection with a private employer's restriction of benefits in a temporary disability program, does not, without more, amount to sex discrimination. The Court regarded the trial record as inadequate to establish discrimination because it did not show either that the restriction was a pretext for sex discrimination, or that the exclusion had a disparate impact upon women.

On January 10, 1977 the Court granted defendants' petitions for certiorari, vacated this court's order vacating dismissal, and remanded the action here for reconsideration in light of Gilbert.

^{4/} Petitions were filed by defendants Social Service Employees Union Local 371, Social Service Employees Union Local 371 Welfare Fund, United Federation of Teachers and United Federation of Teachers Welfare Fund.

ARGUMENT

Introduction

In Gilbert the Court held that the mere existence of classification on the basis of pregnancy and maternity, in connection with a limitation of benefits under disability plans, does not establish sex discrimination. It has never held that such a pregnancy classification having a substantially disproportionate impact on women is valid under Title VII. Nor could Gilbert be so interpreted unless it is read to overrule Griggs v. Duke Power Co., 401 U.S. 424 (1971), which adopted an "impact" test for Title VII claims.

Further, there is nothing in Aiello or Gilbert which suggests that forced maternity leave is lawful under Title VII or the Fourteenth Amendment contrary to the recent decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), holding forced leave for pregnant teachers arbitrary and prohibited by the Fourteenth Amendment. Finally, Aiello presented no claims under the Fourteenth Amendment that the cumulative effect of the challenged maternity plan operated to penalize the exercise of the right to procreation or that exclusion of complicated pregnancies from the challenged plan was arbitrary and irrational.

Plaintiffs' claims are therefore by no means extinguished. Plaintiffs contend -- and are entitled to an oppor-

tunity to prove -- that the actual operation of defendants' health, hospitalization, disability, and accumulated leave plans has had a disparate impact upon women, in violation of Title VII. The complaint also states a valid claim under Title VII and the Fourteenth Amendment for forced maternity leave. The complaint further states a valid claim under the Fourteenth Amendment in that defendants' benefit and forced-leave plans single out persons who exercise their fundamental right to procreate and impose penalties upon them for doing so. Finally, a valid claim is stated for discrimination against women who suffer medical complications in connection with pregnancy and maternity. None of these theories is undermined by Gilbert, and plaintiffs are entitled to proceed upon all of them. 5/

In reconsidering its prior order, this court must apply the well-established standards for reviewing dismissal of a complaint on its face: that the court take all plaintiffs' allegations as true, construe the complaint liberally in favor of the plaintiffs, and affirm the dismissal only if it appears "beyond a doubt" or "to a certainty" that there is

5/ Since this action was commenced in January 1974, the law regarding the treatment of pregnancy and maternity under the Fourteenth Amendment and Title VII has changed markedly. As a result, some of the legal theories advanced in this brief are not precisely spelled out in the complaint, although the complaint gives ample notice of plaintiffs' claims. After remand to the district court plaintiffs intend to amend and clarify the complaint.

no set of facts which, if proven, would entitle plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284, 287 (2d Cir. 1971).^{6/} As plaintiffs would be entitled to relief if they prove the facts alleged, this court's prior order should be reinstated and the case remanded for further proceedings.

POINT I

PLAINTIFFS ARE ENTITLED TO AN OPPORTUNITY TO PROVE THAT THE DEFENDANTS' LIMITATION OF HEALTH, HOSPITALIZATION, DISABILITY AND ACCUMULATED LEAVE BENEFITS FOR PREGNANCY AND MATERNITY HAS AN ADVERSE IMPACT UPON FEMALE EMPLOYEES IN VIOLATION OF TITLE VII.

The Gilbert case reached the Court on appeal from a final judgment in plaintiffs' favor after a full trial. In reversing, the Court rejected the argument that women as a class were necessarily affected adversely by the exclusion

^{6/} Affirmance of the district court order would be particularly inappropriate in view of the nature of plaintiffs' constitutional and statutory claims. Cf., Roberson v. Harder, 440 F.2d 687, 688 (2d Cir. 1971) (reversing dismissal where plaintiffs' allegations raised "colorable" constitutional claims); Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir. 1970) cert. den. 400 U.S. 853 (1970) (reversing dismissal and finding the district court's action particularly disfavored in civil rights litigation); Gas-a-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1107 (10th Cir. 1973) (vacating dismissal and finding it inappropriate prior to any discovery in complex litigation). Plaintiffs' allegations are more than ample to pass muster under this standard of review.

of pregnancy-related disabilities from an employer's disability plan. But that was only the beginning -- not the end -- of the Court's Title VII analysis. The Court went on to consider whether the trial record showed that the challenged plan had any disproportionate effect on women. The Court concluded that no such effect could be found because there was uncontroverted evidence that, despite the pregnancy exclusion, women as a group obtained greater overall benefits than males under the plan. Gilbert, 97 S.Ct. at 405, n.9, 408-10. 7/ The Court stated:

"As there is no proof that the [insurance] package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as the result of pregnancy do not receive benefits; . . ."
97 S.Ct. at 409.

The present plaintiffs claim and intend to prove that, unlike Gilbert, defendants' plans have a grossly disproportionate impact on women. 8/ At present, however, the

7/ See also Aiello, 417 U.S. at 497, n.21.

8/ The Supreme Court has before it two cases involving Title VII challenges to employers' denials of sick pay for pregnancy-related absence. Richmond Unified School Dist. v. Berg (75-1069) cert. granted, ___ U.S. ___, 97 S.Ct. 806 (1977) and Nashville Gas Co. v. Satty (75-536) cert. granted, ___ U.S. ___, 97 S.Ct. 806 (1977). Neither case presents a claim that the exclusion had an adverse impact on women as a class and as a result it is unlikely that they will be relevant to the issue presented here.

record is barren on this subject because plaintiffs have so far been denied the opportunity to discover and offer such proof.^{9/} Remand for development of a factual record as a basis for consideration of plaintiffs' claims in light of Gilbert is therefore required. Cf., Liss v. School Dist. of City of Ladue, 548 F.2d 751 (8th Cir. 1977).

Public policy -- so long as it is in reality dedicated to principles of equality in employment -- requires that courts continue to test for discrimination through an analysis of the practical effects of a defendants' plans and policies, Griggs v. Duke Power Co., *supra*, 401 U.S. at 430, 432.

POINT II.

THERE IS NO BASIS FOR DISMISSAL OF PLAINTIFFS' CLAIM CONCERNING THE IMPOSITION OF FORCED MATERNITY LEAVE.^{10/}

A. Forced Leave Violates the Fourteenth Amendment.

In Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973), this court held that forced maternity leave by a public school system constitutes sex discrimination in

^{9/} Plaintiffs should have the opportunity to discover, for example, the average amount of aggregate benefits paid to males and females, the aggregate uncompensated risk experienced by males and females and the cumulative impact of defendants' plans on all other aspects of the employment relationship. The obvious necessity for a complete factual record as a predicate to the decision of legal questions was stressed by this court in the Communication Workers decision, *supra*, 513 F.2d at 1030, 1031.

^{10/} The challenged plans discussed in this section form the basis for claims only against the city defendants, in contrast to the plans and policies discussed in Points I and III of this brief.

violation of the Equal Protection Clause. When the Supreme Court faced the same issue in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) ("LaFleur"), it held that forced leave is prohibited by the Due Process Clause of the Fourteenth Amendment. The Court did not reach the issue of whether forced leave also constitutes sex discrimination and a denial of equal protection. 11/

The complaint alleges the same facts upon which relief was granted in Green and LaFleur, the city's enforcement of a leave plan which, without respect to a pregnant employee's ability to work, forces her "to take premature leave because of a known forthcoming medical problem." Green at 634. On remand plaintiffs will prove that no such leave requirement is imposed on male employees for any reason. Thus under Green and LaFleur plaintiffs clearly have a Fourteenth Amendment claim for declaratory and injunctive relief, whether it is analyzed as a denial of due process or equal protection.

11/ The Supreme Court in LaFleur ruled that "arbitrary cut off dates" for employment were not rationally related to the supposed policy of continuity of instruction (641-43), that a "conclusive presumption" regarding the fitness of pregnant teachers which was not necessarily or universally true violated due process (643-46) and that administrative convenience and efficiency could not validate the unconstitutional deprivation. (646-47) This court had earlier invalidated forced leave on the basis of the Equal Protection Clause and, applying a substantial relationship standard, held "that there are no 'legitimate state interests' which the rule's rigid classification sufficiently promotes to justify the discriminatory treatment." 473 F.2d at 636.

Although defendants' forced-leave plans have been discontinued, ^{12/} plaintiffs seek and are entitled to equitable relief from the continuing effects of having been forced onto leave in the past, in violation of the Fourteenth Amendment. ^{13/} These effects include interrupted seniority, with attendant lost promotions and lower rates of pay. ^{14/} See complaint, ¶ 77 (41a).

In a somewhat similar case (Monell v. Dept. of Social Services, 532 F.2d 259 (2d Cir. 1976) cert. granted ___U.S.___, 97 S.Ct. 807 (1977) ("Monell")), a panel of this court held that the employers' voluntary discontinuance of the challenged forced leave plan rendered the action moot insofar as it sought injunctive and declaratory relief against continuation of the plan. However, the Monell de-

^{12/} Some city plans were discontinued on September 1, 1972, others were not changed until September 1, 1973. (39a-42a)

^{13/} When a citizen has been deprived of liberty or property in violation of the Fourteenth Amendment, the federal courts must afford a remedy which to the greatest possible extent restores the individual to his or her situation prior to the unconstitutional deprivation. As the Supreme Court stated in the context of voting rights discrimination:

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1964).

^{14/} We note that the relief requested by plaintiffs -- their rightful place in terms of seniority and pay -- is an especially important remedy in this day of city cutbacks and layoffs. Cf., Franks v. Bowman Transportation Co., 424 U.S. 747, 766-68 (1976).

cision did not address the issue of the continuing effects of the defendants' past unlawful action and thus it cannot be read to bar as moot the Fourteenth Amendment claims in this action.

Numerous cases hold that discontinuance of an unconstitutional activity does not moot a case if there are any continuing effects for which equitable relief can be granted. See, e.g., Winnick v. Manning, 460 F.2d 545, 548, n.3 (2d Cir. 1972) (claims regarding students' past suspension not moot where recorded on undergraduate record); accord Hatter v. Los Angeles City High School District, 452 F.2d 673 (9th Cir. 1971); West v. Cunningham, 456 F.2d 1264 (4th Cir. 1972) (prisoner's challenge to past illegal segregation not moot where there was a possibility of future adverse collateral legal consequences). Here the complaint alleges that plaintiffs continue to be adversely affected by past forced leave. If this is proven to be true, the trial court will have the power and the duty to grant equitable relief, restoring plaintiffs to their rightful place in the employment hierarchy. ^{15/} Cf., Chance v. Board of

^{15/} Back pay and recovery of other lost benefits, as an incident of this equitable relief, is also part of the remedy which the court should award to make these plaintiffs whole. See, e.g., Stolberg v. Members of Board of Trustees for State College of Conn., 474 F.2d 485, 588 (2d Cir. 1973) (district court awarded as remedies for unconstitutional

Examiners, 534 F.2d 993 (2d Cir. 1976) on rehearing, 534 F.2d 1007, petition for cert. filed (76-344) (Sept. 7, 1976) (approving award of constructive seniority for plaintiffs who were earlier subjected to discrimination in city employment.

B. Forced Leave Violates Title VII.

Forced maternity leave constitutes sex discrimination under Title VII. ^{16/} This conclusion is mandated by Green and is consonant with Aiello and Gilbert. ^{17/} It also

Footnote continued.

discharge, reinstatement with tenure, back pay and no loss of seniority). Accord regarding back pay, Vega v. Civil Service Commission of City of New York, 385 F.Supp. 1376, 1382 (S.D. N.Y. 1974); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Jannetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974).

We recognize that in Monell claims for damages under the Fourteenth Amendment, not incident to equitable relief, were dismissed on the ground that any damages against the named agencies or the individual defendants would have been paid by the city, contrary to the principle that a municipality may not be sued under 42 U.S.C. § 1983. The Supreme Court has granted certiorari to consider the correctness of this decision. We do not believe Monell bars back pay under the circumstances of this case and further believe the issue was wrongly decided in this Circuit.

However, even if under Monell back pay cannot be awarded to plaintiffs, they are entitled to all other remedial action which is available to make them whole -- at a minimum, stepped up seniority, advanced rank and incremental wages.

^{16/} The Supreme Court has granted certiorari to review two decisions holding forced leave constitutes sex discrimination under Title VII. Richmond Unified School District v. Berg, supra, and Nahsville Gas Co. v. Satty, supra.

^{17/} The Court in Gilbert ruled that discrimination means the same thing under Title VII and the Fourteenth Amendment. It held that, in analyzing Title VII claims, the most informing reference would be to the treatment of such claims under the

accords with the E.E.O.C.'s current position on pregnancy leaves. E.E.O.C. Notice No. 915 (December 30, 1976) ¶ 6(d) C.C.H., E.E.O.C. Compliance Manual ¶ 3200. ^{18/}

Defendants' forced leave plan constitutes prima facie sex discrimination because it is explicitly gender-based. Only women are required to stop working prematurely because of a known forthcoming condition which may later require their absence from work.

Because forced leave does not occur within the context of a larger benefit plan it cannot be saved by the analysis employed in Gilbert and Aiello, where the Court upheld the exclusion of pregnancy-related disabilities from comprehensive disability programs. In doing so, it referred to the "indisputable baseline" for review of the challenged plan,

Footnote continued.

Fourteenth Amendment. Hence, this court should look to its decision in Green v. Waterford Board of Education, supra, for guidance to whether forced maternity leave constitutes sex discrimination.

^{18/} In Monell v. Dept. of Social Services, supra, no plaintiffs complained of forced leave imposed after March 24, 1972, the date Title VII was extended to cover municipal employees. The court held that this amendment was not retroactive and that therefore no plaintiffs stated claims under Title VII. Unlike Monell, two of the named plaintiffs in this case, Barbara Robertson and Arlene Friedman, were put on forced leave after March 24, 1972, and before the defendants' policies were changed (7a, 9a-10a). Thus their claims for relief, including back pay, and those of the class they seek to represent, are viable.

-- who the plan covers. Gilbert at 409. In both Gilbert and Aiello the Court stated that there was no gender-based discrimination because "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes." Aiello at 497, n.20 quoted in Gilbert at 409.

In contrast to a disability plan which on the whole benefits members of both sexes, defendants' forced-leave program has application only to pregnant women. This constitutes explicit gender-based classification as much as if the classification singled out female parents and had no application to all other people. Cf., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), where discrimination against women with pre-school age children was accepted to be sex discrimination under Title VII without discussion. ^{19/}

Even if forced maternity leave is not considered to be explicitly gender-based, it violates Title VII because of the exclusive impact of the plan on females. No discriminatory impact claim was made out in either Gilbert or Aiello because of the fact that women as a class fared better under

^{19/} The fact that not all women are injured by forced maternity leave is of no consequence. "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class." Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) cert. den. sub nom. United Airlines, Inc. v. Sprogis, 404 U.S. 991 (1971).

the disability plans than did men. Here, however, because defendants' policy applies and does harm only to women, it is obvious that women fare worse than men in terms of the amount of time their employer requires members of the different sexes to stop working.

Plaintiffs are entitled under Title VII to relief for leaves imposed prior to the 1972 amendment of Title VII as well as for post-amendment forced leave. It is by now generally accepted that Title VII plaintiffs may recover for the continuing effects of discriminatory acts made unlawful by Title VII which occurred prior to the effective date of the statute. Culpepper v. Reynolds Metal Co., 421 F.2d 888, 890, n.1 (5th Cir. 1970). See also United States v. Bethlehem Steel Corp., 446 F.2d 652, 661-62 (2d Cir. 1971) (granting relief from seniority provisions which perpetuated earlier discriminatory practices); accord, Local 189 United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) cert. den., 397 U.S. 919 (1970). For particularly similar cases, see Farris v. Board of Ed. of City of St. Louis, 417 F.Supp. 202 (E.D. Mo. 1976) (granting plaintiffs stepped-up seniority, increased pay, and the differential back pay since 1972 for dislocation from forced maternity leave imposed in 1971); Keenan v. Pan American World Airways, Inc., ___ F.Supp. ___, 13 E.P.D. ¶ 11,454 (N.D.

Cal. 1976) (denying motions to dismiss claims for stepped-up seniority and pay differentials resulting from forced resignation for maternity imposed before the effective date of Title VII. ^{20/} See also Melani v. Board of Higher Education of the City of New York, ___ F.Supp. ___, 12 E.P.D. ¶ 11,068 at 4964 (S.D.N.Y. 1976).

POINT III

DEFENDANTS' HEALTH, HOSPITALIZATION, DISABILITY BENEFIT AND LEAVE PLANS IMPOSE A PENALTY ON THE EXERCISE OF THE RIGHT TO PROCREATION AND IRRATIONALLY DISCRIMINATE AGAINST PREGNANT WOMEN WHO SUFFER COMPLI-CATIONS IN CONNECTION WITH PREGNANCY, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. Defendants' Plans Penalize the Exercise of Protected Freedoms.

The challenged plans on their face impose burdensome penalties on people who exercise their fundamental personal rights to bear offspring. The Supreme Court has ruled that laws or regulations "must not needlessly, arbitrarily or capriciously impinge upon this vital area of a teacher's constitutional liberty." Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 640. ^{21/} Only employees who exercise their

^{20/} The Supreme Court may consider the appropriateness of constructive seniority for women on maternity leave in Nashville Gas Co. v. Satty, supra.

^{21/} We note that with the single exception of LaFleur, the Supreme Court's recent extension of constitutional protection with respect to the exercise of personal liberty in choices

rights and privilege of procreation are penalized by (1) forced maternity leave which keeps them from continuing to work while pregnant, interrupts seniority and triggers disqualification from still other fringe benefit plans; (2) exclusive disability benefit plans which provide them with no compensation when they are physically incapable of working even if the disability is the result of a seriously complicated pregnancy or childbirth; (3) limited hospitalization insurance which provides only nominal reimbursement for hospital expenses incurred in connection with childbirth and pregnancy; and (4) leave plans which bar the use of accumulated sick or annual leave in connection with pregnancy and maternity. ^{22/} Since forced leave alone -- to say nothing of the combination of penalties enumerated above -- was held

Footnote continued.

concerning childbearing has occurred in the area of avoiding or terminating pregnancy. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1964) and Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Roe v. Wade, 410 U.S. 113 (1973); and Planned Parenthood of Central Mo. v. Danforth, ___ U.S. ___, 96 S.Ct. 2831 (1976) (abortion). It would be ironic if the protections of the constitution were more readily extended to women who chose not to bear children than to those who do. ^{22/} Since most women work because they must and since many women who head households are often poverty-stricken, their exclusion from health and welfare benefits works a particularly serious hardship. The extent of this hardship -- which may be material to the final decision concerning the legal questions in this case -- is one of the issues to be developed below on remand.

to constitute an unconstitutional "heavy burden" on the exercise of protected freedom, it is clear that plaintiffs are entitled to pursue this claim on remand to the district court. ^{23/} On remand the challenged policies can be upheld, if at all, only if the defendants show them to be "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, supra at 155. ^{24/} When important constitutional rights are at stake, mere considerations of cost-saving or administrative convenience will not provide sufficient justification for the policies. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (declaring unconstitutional a state statute denying free non-emergency medical care to indigents not meeting residency requirements); Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 645-7.

^{23/} This is not a case like Kelley v. Johnson, 425 U.S. 238, (1976), where the challenged regulation lies at the heart of the exercise of police power and is therefore presumptively valid. The city's policies penalizing its ordinary employees in the exercise of constitutional rights are entitled to no special deference. Cf., East Hartford Educational Ass'n v. Board of Education of the Town of East Hartford, ___ F.2d ___ (No. 76-7005) (2d Cir., Feb. 22, 1977).

^{24/} The district court has so far refused to require defendants to offer any justification for their treatment of pregnancy, and as a result it is impossible to determine the legitimacy of defendants' purpose, the relation between the exclusion and any supporting policies, or whether any policies are suitably furthered by the exclusion.

B. Defendants Have Unlawfully Discriminated
Against Women With Complicated Pregnancies.

Three of the named plaintiffs in this action are women who suffered medical complications in connection with their pregnancies. ^{25/} Their plight is indistinguishable from that of an employee, ill or injured by some other cause and they have a claim under the Fourteenth Amendment for arbitrary and irrational exclusion from health and welfare benefit plans. The concept of equal protection safeguards citizens against all forms of irrational and arbitrary classification, not just those based on race, sex, or burdening some other constitutionally-protected right. Cf., Gomez v. Perez, 409 U.S. 535 (1973) (invalidating classification based upon the status of illegitimacy), and U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating a classification of food stamp recipients based upon the familial relationship of household members). Pregnant women with medical complications are entitled to the protection of the Fourteenth Amendment no less than illegitimate children and potential food stamp recipients.

Assuming that under Aiello it is constitutionally permissible to exclude normal pregnancy or afford pregnant

^{25/} Plaintiff Gross was hospitalized for complications (9a). Plaintiffs Blitz and Mills gave birth by caesarian section (12a, 14a). In addition, the dependent wife of plaintiff Sussman was hospitalized for hyperemesis (11a).

women substantially less protection under the defendants' various benefit plans, it does not follow that temporary disability, hospitalization, medical services and absence from work which are incident to a complicated pregnancy may be excluded. ^{26/} Indeed, in Aiello the plan adjudicated to be in conformity with the Fourteenth Amendment covered disabilities related to complications from pregnancy. While normal pregnancy may rationally be regarded as sufficiently dissimilar from ordinary injuries and illnesses to warrant its exclusion or differential treatment under the health plans, the same cannot be said for complications. Unlike pregnancy itself, complications are not "voluntarily undertaken and a desired condition." Gilbert at 408. Even if, like some other conditions (e.g., prostatectomy, hemophilia), these medical complications may result from a characteristic unique to one sex, such complications constitute a "disability comparable in all other respects to covered diseases and disabilities." Id. As a result, plaintiffs claim that there is no rational basis for defendants' treatment of complex pregnancy. In response to this claim defendants are required to show that "the challenged distinction rationally furthers some legitimate,

^{26/} The Supreme Court has not had occasion to decide whether it is a violation of the Fourteenth Amendment for a governmental employer to deny benefits to a person whose pregnancy requires surgical procedures or hospitalization for complications.

articulated state purpose. McGinnis v. Royster, 410 U.S. 263, 270 (1973). 27/ Cf., the justifications advanced by the State of California in Aiello in support of its exclusion from the state plan of disabilities relating to normal pregnancy. However, until defendants come forward with a justification for this exclusion it will be impossible to judge its legal validity.

Conclusion

For the reasons stated above, the court should reinstate its order vacating the district court's order dismissing plaintiffs' complaint.

Dated: New York, New York
April 18, 1977

Respectfully Submitted,

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27/ Recent Supreme Court decisions show that flimsy, saving rationales may no longer be ingeniously manufactured by the courts. See, e.g., James v. Strange, 407 U.S. 128 (1972); cf., Green v. Waterford Board of Education, supra, 473 F.2d at 634.

ADDENDUM

Constitutional Provisions, Statutes and Regulations Involved

The Fourteenth Amendment to the United States Constitution provides in relevant part:

Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act of 1871, 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2, et seq., provides in relevant part:

DISCRIMINATION BECAUSE OF RACE, COLOR,
RELIGION, SEX, OR NATIONAL ORIGIN

[Unlawful Practices of Employers]

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The Guidelines of the Equal Opportunity Employment Commission, 29 C.F.R. § 1604.9 et seq. provide in relevant part:

Sec. 1604.9 Fringe Benefits.--(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * *

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WOMEN IN CITY GOVERNMENT UNITED, et al., :
Plaintiffs-Appellants, : Docket No. 74-2352
-against- :
THE CITY OF NEW YORK, et al. : AFFIDAVIT OF
 : SERVICE BY MAIL
Defendants-Appellees. :
- - - - - x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:

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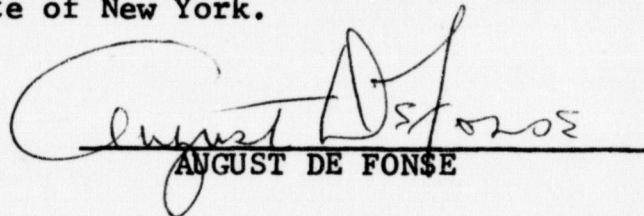
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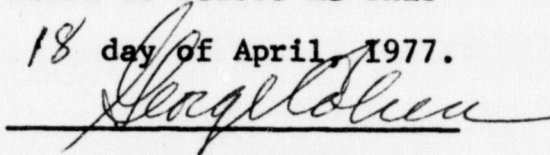
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the addresses designated for that purpose by depositing true copies
of same enclosed in postpaid properly addressed wrappers in offi-
cial depository under the exclusive care and custody of the U.S.
Postal Service within the State of New York.


ANGUST DE FONSE

Sworn to before me this

18 day of April, 1977.



GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York COUNTY
Commission Expires MARCH 30, 1979